

Court of Appeals, State of Michigan

ORDER

Allstate Home Loans Inc v Fifth Third Bank of Michigan Corp

Docket No. 292518

LC No. 08-107307-CH

Michael J. Talbot
Presiding Judge

Kurtis T. Wilder

Christopher M. Murray
Judges

In lieu of granting leave to appeal, pursuant to MCR 7.205(D)(2), the Court orders that the April 13, 2009, order of the Wayne County Circuit Court, which granted the motion for summary disposition filed by Fifth Third Bank, is REVERSED. Fifth Third Bank's motion for summary disposition only sought dismissal under MCR 2.116(C)(10) based on the alleged forgery of Darryl Bocage's signature on the mortgages held by plaintiffs. Since Fifth Third Bank did not raise the issue regarding which mortgage had priority under MCL 565.29, plaintiffs were not obligated under MCR 2.116(G)(4) to carry their burden of proving that Fifth Third Bank had notice of their mortgages. See *Ooley v Collins*, 344 Mich 148, 158-159; 73 NW2d 464 (1955). Accordingly, it was improper for the trial court to sua sponte dismiss plaintiffs' claim against the bank on the basis that Fifth Third Bank had no notice of plaintiffs' mortgages and had priority under MCL 565.29. See *Haji v Prevention Ins Agency*, 196 Mich App 88-90; 492 NW2d 739 (1992) (Corrigan, J., concurring). Furthermore, the plaintiffs' complaint contained allegations that were sufficient for actual or constructive notice under MCL 565.29, and the parties should develop the record with respect to this issue before moving for summary disposition.

Pursuant to MCR 7.215(F)(2), this Court further directs that this order shall take immediate effect. The Court retains no further jurisdiction.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

OCT 01 2009

Date

Sandra Schultz Mengel
Chief Clerk